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Issue Date: 24 September 2004

Case No.: **2002-LHC-0180**

OWCP No.: **5-29852**

In the matter of

ROBERT P. BOLT, JR.,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer/Self-Employed.

DECISION AND ORDER[1]

This proceeding arises from a claim filed under the prevision of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 et seq.

A formal hearing was held in Newport News, Virginia on March 30, 2004 at which time all parties were afforded full opportunity to present evidence and argument as provided in the Act and the applicable regulations. A supplemental hearing was held on July 8, 2004.

The findings and conclusions which follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

STIPULATIONS

The Claimant and the Employer have stipulated to the following:

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[1] [1] The following abbreviations will be used as citations to the record:

JS	-	Joint Stipulations;
TRM	-	Transcript of the Hearing in March 2004;
TRJ	-	Transcipt of the Hearing in July 2004;
CX	-	Claimant's Exhibits; and
EX	-	Employer's Exhibits.

1. That the parties are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act;

2. An Employer/Employee relationship existed at all relevant times;

3. The Claimant sustained an injury to his knees on May 14, 1980 that arose out of and in the course of his employment;

4. The Claimant's average weekly wage at the time of the injury was $245.96 which yields a compensation rate of $163.97;

5. As a result of the injury, the Claimant suffered an eight percent (8%) permanent partial disability to his right lower extremity, entitling him to compensation for 23.04 weeks at $163.97 per week, amounting to $3,777.87;

6. As a result of the injury, the Claimant suffered a 28% disability to the left lower extremity, entitling him to compensation for 80.64 weeks at $163.97 per week, amounting to $13,222.54;

7. The Claimant reached maximum medical improvement from his left knee injury on or before January 17, 1993 when he was given his most recent disability rating to the knee;

8. As a result, at least in part, of the May 14, 1980 left knee injury, the Claimant was and is permanently and totally disabled from January 27, 1993 and continuing, entitling him to compensation at the rate of $163.97 per week plus applicable cost of living adjustments. (CX 7, stipulations in the May 7, 1999 decision).

ISSUES

Pursuant to a Section 22 request for modification of an award, has the employer demonstrated that suitable alternate employment is available to the claimant.

CONTENTIONS

At the first hearing, the employer argued that the claimant has a wage earning capacity. He interviewed and was offered a position with Genex.

> It is our position he does have a wage-earning capacity and based on the fact that his two injuries, or his injuries involve his legs, that as a result of the wage-earning capacity, his compensation should be cutoff, and that any unpaid award of permanent partial disability rating would be due, he would not be entitled to any ongoing compensation. (TRM 5).

Claimant's counsel submitted a brief and argues that

The evidence clearly establishes that the position with Expeditor is sham employment. The Employer's key witness established this very fact. Felman admitted that (1) Newport News Shipbuilding established the wage rate for this position; (2) that Newport News Shipbuilding pays a flat fee to have an individual placed in the program, and (3) Newport News Shipbuilding provides the wages for the job through a subsidy, which is then distributed through Expeditor to the bridge Employer to the employee. These factors and many more establish that this job is merely sheltered employment. This Court should so find.

This Expeditor job benefits the Employer, Newport News, not the Claimant. Felman, with his lack of vocational expertise, could not testify as to whether the position at Expeditor would lead to successful employment for Mr. Bolt. (TRM 92). He testified that Mr. Bolt may still be subsidized today had he accepted the job with Expeditor. (TRM 92). Admittedly then, in Felman's opinion there is no guarantee that Mr. Bolt would be needed in the industry without the subsidized assistance of Newport News Shipbuilding.

Congress recently passed a law which allows individuals to place their names on a "do not call" list. Once an individual's name is on this list then phone solicitation is prohibited. Charles DeMark, the Claimant's vocational expert, testified that this make it very difficult for phone solicitation. Some companies have ceased communications altogether or closed down certain locations based upon this law.

Employer's own doctor, Dr. Robert Neff, concluded that Mr. Bolt could only work twenty hours (20) per week. Dr. Nichols, Mr. Bolt's treating physician, echoed that opinion and found that Mr. Bolt would need the opportunity to rest and relax at his own discretion-even allowing for periods of rest and sleep. So then, this job, even if approved, does not consider the Claimant's work restrictions and is therefore not appropriate.

Pertinent Criteria

Section 22 of the Act provides that

Upon his own initiative, or upon the application of any party in interest (including an employer or carrier which has been granted relief under section 8(f)), on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim review a compensation case (including a case under which payments are made pursuant to section 44(i)) in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may

terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of injury, and any payment made prior thereto in excess of such, decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Secretary. This section does not authorize the modification of settlements.

In this case, Employer has that Claimant is unable to return to his former job at the Shipyard given his injuries. Because the Claimant has made this prima facie showing, the burden shifts to employer to show suitable alternative employment. Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen v. Ebbtide Fabricators, 19 BRBS 142 (1986). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989) (involving injury to a scheduled member); MacDonald v. Trailer Marine Transp. Corp., 18 BRBS 259 (1986), aff'd, (No. 86-3444) (11th Cir. 1987) (Unpublished).

Evaluation of the Evidence

Records from Dr. Nichols indicate that the claimant had undergone surgery on both knees and on the left ankle. Clinical history included nephrosclerosis in 1977, and malignant hypertension. In February 1998, Dr. Nichols stated

> The question arises as to whether or not the patient can return to work. I understand Dr. Neff has opined that the patient could return to sedentary work 4 hours a day if he has 15 minutes each hour when he can get up and walk around. I do think this is a reasonable statement, however, Robert states to me that because of his intermittent episodes of giving way and severe pain in the knees, he would be an unreliable worker. He is certainly willing to try working but he is concerned that because he would have to take a lot of time off randomly that he is afraid he would not be able to work on a consistent basis. I agree with this. Although the patient could conceivable return to work 4 hours a day, I do not think he would do so on a steady basis. I think he would need frequent days off, particularly if he had an episode of giving way or pain with over-use.
>
> In summary, I feel that the patient still has a permanent disability which prohibits him from work on a regular basis. (CX 1).

At the beginning in March 2004, Leonard Felman testified that he was the CEO of Expeditor Corporation. Felman stated that the

> Primary work of Expeditor is accommodations. We accommodate the disabled in various – in various ways and various methods, mainly, in teleworking. However, we do all types of accommodations and we deal with all types of inabilities, disabilities, both mental and physical, and have done so since 1990.
>
> … Expeditor's primary purpose of existence is to both provide a position that is suitable for an injured person and the suitable accommodations that the individual would require to perform the job.

Referrals from Newport News would come through Genex which would be the primary vocational company on the case. (TRM 31-32). Expeditor would receive the referral with medical reports and background information.

> Expeditor would go over the application and first determine if the individual was experienced in telework, had a background of it. The type of background that the individual has. If the person who we would refer had a background, there are certain types of positions we would refer them to.
>
> If a person had never had any type of telephone work or any background of this type, we would refer them to a bridge employer that begins a series of training and development for the individual. (TRM 33).

If a person filled out an application and was accepted, he would be referred to a "bridge employer".

A subsidy is offered to the potential employer. Generally it's set at about 850 hours on average. The wages, plus the insurances and Social Security, employment compensation, and everything else is paid by the carrier or the insurance carrier or the employer for a period of ideally 850 hours. It can be more or it can be less. (TRM 38 & 39). Dr. Nichols approved this position in 1999. (See EX 11). A bridge employer, Smart Telecommunications, had a surveyor position available in 2001. Smart had been sold to EMR. Di Cenzo Corporation took over some of the business from Smart. Bolt did not respond to letters regarding potential positions that were sent to him in November 2001 and in April 2003.

Felman testified that 2000 several universities and the Department of Education had expressed interest in telework for the disabled. Such work would be

> Basic list clearing, doing clearing of – for example, calling and asking companies if they have changed their e-mail, do they have a website, any personnel changes, and all the mailing and phone numbers and fax numbers are consistent that were on the list. This is something that is done on all lists, all commercials, at least four times a year. (TRM 62).

Calls would generally be to companies, but charities such as the American Heart Association made calls to secure block captains to seek donations from neighbors. Reference

was made to EX 4, a list of companies that provided at home telework opportunities for the disabled.

Felman stated that Social Security now has a program of this nature to encourage people to work. Benefits continue for a period of time. (TRM 68). The Veterans Administration had developed a program. Expeditor is listed on Social Security's Ticket to Work website. (TRM 75). Expeditor received about 15 referrals a day and, after screening, about 20% would receive brochures. About 1% respond to the mailings. OPM put out manuals on telework based on a law passed in 2000. (EX 9 & 10).

Felman testified that Expeditor received a fee of $3,000.00 for a referral from Genex. The fee was paid whether or not the worker was placed with a bridge employer. Such an employer like EMR or Smart would receive the worker's wage plus an hourly subsidy.

At the hearing in July 2004, the claimant testified that he had had about six surgeries on each knee. The joint pain was

Pretty severe. Especially when the weather changes, it gets real stiff, you move. You've got to sit there in the morning, okay, stand beside the bed and work your leg, get it to moving back and forth. Walking is real painful. You have to walk because if you don't, it'll make it stiff. (TRJ 8).

He had difficulty sleeping and would sleep during the day and at night. The kidney disorder produced high blood pressure, and diabetes had been diagnosed.

Charles DeMark, a certified rehabilitation counselor, testified that

> Benevolence or sheltered employment basically involves two different aspects. One would be a situation where an employer retains or hires a person because of a special relationship or a special feeling for the injured worker.
>
> In other words – and I guess the best example would be a company where a man has worked for 15 years and then injured and the company thinks of – or tells the employee I think we've always thought a lot of you, we like you a lot, you can't do the job you did before, and we're going to give you a special job.
>
> We're going to modify your job and we're going to keep you on the payroll and maintain your benefits because we like you or because we think a lot of you.
>
> That would be – that would be benevolent employment. That would be the idea that you're giving that person a job because of that extra special concern or feeling of well-being for the injured worker.

Sheltered employment is a little different and sheltered employment would involve a situation where the employer makes a job that maybe may have more than one employer.

So let's suppose an employer sets up a special unit where they give work to injured workers and all of the workers are injured or all the workers are in need of accommodations, so a sheltered workshop – or sheltered employment would be maybe larger in scope but geared more towards possibly a group of people.

Another example of sheltered employment would be the idea of a special workshop where you have to be disabled to work there. So the difference between sheltered and benevolent employment is a matter of degrees or the arrangement that the individual worker would find from the employer. (TRJ 23 & 24).

DeMark stated that he became aware of Expeditor about 1999 and that he was present to hear Felman's testimony. Discourse between claimant's counsel and DeMark included

Q. Do you have an opinion as to whether or not this Expeditor program and the referrals they make to various different companies constitutes sheltered employment?

A. I think my opinion would be that it's subsidized employment. It would be, it could be called sheltered, it could be called benevolent, it could be called special employment. It would fit any one of those categories.

Q. Is it real employment they'd be able to get on the open-market place?

A. It's my opinion that it is real employment.

Q. Why is that?

A. I think the real test is whether or not, whether or not the work with Expeditor then leads to a real job. Whether or not the idea of the subsidized employment that Expeditor offers whether or not that subsidized employment then can lead to a successful placement for the particular worker we're talking about, whether it's Mr. Bolt or any other person in the open-market.

And again, in that examination, what I look at is whether those are development of real skills during that Expeditor employment to the point where the injured person is then able to go out in the labor market to compete and secure real employment with another private employer. And in the cases that I've examined, that's not the case. (TRJ 25 & 26).

DeMark indicated that the do not call law had resulted in the closure of calls centers such as a local facility for MCI. In addition, many businesses were using computers to answer calls. The witness stated that

> The model of the Expeditor program that Mr. Bolt was working with begins with the idea of subsidized employment.
>
> In other words, it's a situation where the model uses several different go-betweens to transfer money from one company to another to give the appearance that a person is being hired independently when, in fact, there's nothing independent at all about it.
>
> In other words, the Expeditor model that deals with hiring disabled people under the Worker's Compensation system is marketed and presented as being a solution to the worker's compensation problem.
>
> That's completely different than the Ticket-to-Work model or welfare model or the Veteran's Administration model. (TRJ 33 & 34).
>
> … in Mr. Felman's model, the person goes through the Expeditor program goes through a period of subsidized employment, goes through what is called the bridge employer, and then at some point is then released from their subsidized employment program with the idea that they will then go out and compete in the open-market against other workers.
>
> So, again, in that model you have a person who comes out of Expeditor subsidized employment who then is – goes into a labor pool with these other experienced workers and then the expectation they're going to be hired, and I don't – I can't agree with that -- with that protocol.
>
> Q. The MCI workers will have computer experience?
>
> A. Computer experience, typing experience, possibly bookkeeping or other accounting, perhaps. (TRJ 44 & 45).

Discussion

Felman mentioned programs by the Veteran's Administrator, by Social Security, and by the U. S. Department of Education which are intended to employ the handicapped in jobs involving the use of a telephone. He also described a program where Newport News sends an injured worker's case to Genex, with referral to Expeditor, and ultimately to a bridge employer.

The bridge employer will place a worker in a subsidized position with the hope that the workers will continue in such a job after the subsidy expires. This is a great concept but neither

Felman nor Newport News has provided any documentation that an injured worker has ever completed such a program and been employed in an unsubsidized position.

DeMark suggests that once the subsidy lapses the worker will be cast adrift. DeMark cited competition such as laid off MCI workers who have experience with computers. The undersigned does not find it reasonable to assume that there will be a ready market for someone such as Bolt after Newport News' financial contribution ceases.

Therefore, the employer has not shown the existence of suitable alternate employment. Payment of permanent total disability will continue.

ORDER

1. Payments prior to May 17, 1999 are correct, and the employer is to pay permanent total disability from May 17, 1999 and continuing.

2. Employer shall receive credit for any compensation previously paid.

3. Interest at the rate specified in 28 U.S.C. §1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits and penalties, computed from the date each payment was originally due to be paid. See Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984).

4. Claimant's attorney, within twenty (20) days of receipt of this order, shall submit a fully documented fee application, a copy of which shall be sent to opposing counsel, who shall then have ten (10) days to respond with objections thereto.

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RICHARD K. MALAMPHY
Administrative Law Judge

RKM/ccb
Newport News, Virginia